UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

v. 12 Cr. 876 (VSB)

PAUL CEGLIA,

Conference

Defendant.

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New York, N.Y.
January 30
4:00 p.m.

Before:

HON. VERNON S. BRODERICK

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ALEXANDER J. WILSON
JANIS ECHENBERG
Assistant United States Attorneys

ROBERT ROSS FOGG
GIL D. MESSINA
Attorneys for Defendant

GIBSON, DUNN & CRUTCHER LLP
Attorneys for Facebook and Mark Zuckerberg
BY: ORIN SNYDER
ALEXANDER H. SOUTHWELL

PAUL CEGLIA (tel.)

(Case called)

THE COURT: Will the parties please note your appearance for the record. I want to hear from Mr. Fogg, but we haven't been able to get through to the defendant, and I'm not going to proceed without him. Why don't the parties identify themselves, parties and also the attorneys from Facebook, if they could identify themselves for the record.

MR. WILSON: Good afternoon, your Honor. Alexander Wilson and Janis Echenberg for the government.

THE COURT: Good afternoon.

MR. FOGG: Good afternoon, your Honor. Robert Ross Fogg representing Mr. Ceglia.

MR. MESSINA: Good afternoon, your Honor. Gil Messina representing Mr. Ceglia. I filed a pro hac vice motion this morning. I was advised that my certificate of good standing was out of date by one day, so I will be correcting that directly.

THE COURT: So you know what that means, Mr. Messina, they may have bounced your request. For purposes of this appearance, I will allow you to appear, with the understanding that you will fix that by the next appearance.

MR. MESSINA: I will do that.

MR. SNYDER: Orin Snyder and Alexander Southwell, representing Facebook and Mark Zuckerberg.

THE COURT: Mr. Fogg.

MR. FOGG: Your Honor, we have been trying to contact my client via the phone. He was aware that we were going to make our appearance. We lost contact coming into the building. I'm not too sure why there is a delay or at least a failure to answer the phone. We did try to also send out an email, but the email may take a little while for him to respond.

Judge, with that said, I know this Court says that it will not proceed unless he is present. I don't want to delay the proceedings. There are very sensitive issues here. I would like to proceed in his absence, and I will speak on his behalf.

THE COURT: Here is the problem. As I understand the law, he has every right to be here at every proceeding that affects his criminal case. As I understand it, he hasn't waived his appearance.

MR. FOGG: No, he hasn't.

THE COURT: In connection with this. While I appreciate and I understand wanting to move things forward so that we could deal with things, I just am not willing, without his explicit waiver, to go forward. As you mentioned, there are a series of motions that we are going to be talking about. I was going to try and deal with the subpoena first. I'm assuming that is the one issue the Facebook lawyers are here for, so if they need to go, they can go.

It looks like we are ready to go.

MR. FOGG: I'm sure he appreciates your position on that, and I'm sure he would like my position to have been the same.

THE COURT: This happened, it is on the record, but I'm not going to mention it.

THE DEFENDANT: Hello.

THE COURT: Is this Mr. Ceglia?

THE DEFENDANT: Yes, this is him.

THE COURT: This is Judge Broderick. First of all, am I pronouncing your name correctly?

THE DEFENDANT: Yes, sir. "Ceglia" is fine.

THE COURT: Mr. Ceglia, we are here. We have a court reporter. Mr. Fogg is here and Mr. Messina is here. The government attorneys are here as well as attorneys from Facebook. We are ready to proceed with today's conference. OK?

THE DEFENDANT: Yes, sir.

THE COURT: What I would like to try and do is deal with the subpoena issue first. I don't know who is prepared to speak. As I understand it, there has been some discussion between the government and Mr. Fogg concerning the scope of the subpoena and that there is at least some agreement. I want to get a sense. Is there agreement across the board or is there still dispute as to that? Then I will hear from Facebook's attorneys to find out whether they are in the loop on this.

MR. WILSON: Yes, your Honor. As to the new subpoena that was filed yesterday by Mr. Ceglia, the government has no objections to any of the requests contained in that most recent version.

THE COURT: Then, Mr. Fogg, what I guess I need to determine is the most recent one, as I understand, and perhaps I'm reading this incorrectly, is I thought to address some of the concerns. In other words, this isn't additive. This is something that you are putting forth as a means to move the ball forward, so to speak.

MR. FOGG: Yes, your Honor, that is correct. On October 24th we submitted to the Court and to the government a motion along with an email and a request for subpoena. It is my understanding -- not just my understanding, it is very clear -- that the government is adamant they felt that was too broad. We then narrowed it down and then presented it back.

They felt at that time, through motion practice, from what I see, that my request under 1 and 2 were significantly reduced down. At least that is my opinion; I feel it was. The government can always state their position on it. Only recently I have been able to narrow it down, narrow it down even further, be more specific such that Mr. Wilson and Ms. Echenberg were fine with the third request.

Based on no objection by the government and my request, which I believe has been significantly narrowed in

scope and specifically targeted, we put forth the request for the issuance of a subpoena, Judge.

THE COURT: All right. At least with regard to the government and the defense, there is no issue with regard to the subpoenas that the defense is requesting at this time? In other words, there is nothing for me to decide vis-a-vis the government and defense?

MR. FOGG: That's my position. I can't speak for the government.

THE COURT: Mr. Wilson?

MR. WILSON: The government has no objection to the issuance of those subpoenas. I don't know that there is anything to decide vis-a-vis the government and Mr. Ceglia at any time. The government has standing to contest the subpoenas. Facebook, as the recipient, has standing as well. But no, the government is not opposing this new motion.

THE COURT: I want to know if I need to rule on something. I was prepared to rule on things. But I'm perfectly happy that the parties have conferred and have come to some sort of agreement, at least the parties.

Now I will hear from Facebook. Mr. Snyder.

MR. SNYDER: Your Honor, unfortunately, although Mr. Fogg and Mr. Messina know our phone numbers, our email addresses, and how to reach us, they, for whatever tactical reason, failed to meet and confer with us about the subpoena,

despite the fact that Mr. Southwell met and conferred extensively with defense counsel concerning the second and the first, certainly the first subpoena. The first time we saw the subpoena was this morning and have not had an opportunity to fully review it or confer with our clients. On its face, it appears to us to remain overbroad and outside the bounds of rule 17(c).

What we would respectfully request is the opportunity to provide to the Court in writing promptly by next Friday our written objections so that the Court has on the record OUR position and we have a meaningful opportunity to respond.

THE COURT: I suggest between now and next Friday that you take some more time, look through the subpoena, go over it with your client. I understand from what you said you haven't had an opportunity to do that. See if there are things that you are willing to concede on so that the issue is narrowed sufficiently or if there is, quite frankly, room that you think there is to negotiate it down, speak with Mr. Fogg. You can include the government in those discussions. Obviously, if you still feel you need to put something in on Friday, absolutely do that.

Mr. Fogg, how much time would you need to respond?

MR. FOGG: Your Honor, if I may, on the first instance, I do object to the attorneys for Facebook to be present in the case, present at the table, to address the

Court, and also to submit documents to the Court. At this present time there is a subpoena request. There is no issuance of a subpoena. They do not have standing yet to contest. They should wait to receive if they do receive.

THE COURT: I understand your argument. The problem is that I think that would be inefficient. In other words, in part because having done this, what would have happened is we would have been back here anyway. You would have negotiated with the government, you would have then served the subpoenas, they would have had a certain amount of time to respond, and we would have been here anyway.

I understand the objection with regard to this. I understand also, and I appreciate the process, that the two parties consulted, they have reached an agreement. But I do believe that since Facebook is going to be the recipient of the subpoena, although I understand what you are saying, I think this is a more efficient way to proceed, since this is the way it had been going when I got the case.

What I would ask the parties to do is to meet and confer and see if you can reach an agreement. If not, I will get Facebook's submission in a week. Mr. Fogg, how much time do you need?

MR. FOGG: Time to do what, Judge?

THE COURT: If they are objecting to the subpoena, it would be your response to their objection. In other words, as

I understand it, Mr. Snyder has given an indication that at least his preliminary view was that it was overly broad.

MR. FOGG: How many weeks did Mr. Snyder take?

THE COURT: Just a week.

MR. FOGG: Then I will take a reciprocating week to respond.

THE COURT: OK.

MR. FOGG: If we could limit the correspondence to your Honor on the issue of the subpoena and no prior actions or any other facts that might bias or prejudice the Court, it will be greatly appreciated. The last submission that was provided to the Court delved into facts that are not before the Court just yet, before a trial ever occurs.

THE COURT: I recognize that emotions may be high among not necessarily the parties, but I'm not going to be the fact-finder. I understand that. We are dealing with the subpoena. Mr. Fogg, I heard what you said, but I still want the parties to meet and confer on this. I'm not characterizing submissions one way or the other. But you are all members of the bar, and I'm looking to try and see if we can come up with some solution to the subpoena issue.

I would like any letters to be addressed to the subpoena issues as they stand. I recognize that one side or the other may believe that the other side is putting extraneous information in the submission. I'm not going to make a

determination as to that one way or the other. I'm just going to look for the facts that I need in order to make a determination with regard to the subpoena issue.

What I would do is I would say simultaneous submissions. Well, actually not simultaneous. Facebook would submit and then you will get a week. No reply. If I have any questions, I'll schedule a phone conference and we can deal with that and I'll rule from there. Otherwise, I'll just rule.

MR. FOGG: That will be fine, your Honor.

THE COURT: Fantastic.

MR. SNYDER: We are delighted to meet and confer and will do our best to not have to come before your Honor again. Hopefully, we can compromise.

THE COURT: I'm here to resolve disputes. I just want to make sure that the when the parties are at a point where they can't proceed anymore and there is in fact a dispute.

MR. SNYDER: Thank you, your Honor.

THE COURT: Thank you.

Mr. Ceglia, the attorneys are stepping out of the well and they are conferring with Mr. Fogg and exchanging contact information. This is what the delay is.

THE DEFENDANT: Thank you, your Honor.

MR. FOGG: Thank you, your Honor.

THE COURT: Sure. What I thought I would do is go through the motions as I have them. I have some questions with

regard to some of them, Mr. Fogg. Others I'm prepared to rule on today. Then I also have some questions, logistical questions, about the trial. I think that should be it from my standpoint.

I'll go through the motions. Mr. Fogg, obviously, just let me know if I miss one, because there were several of them.

First, with regard to the motion to dismiss the indictment on the grounds of duplicity, I don't remember, but I thought there may have been a similar type motion that Mr. Ceglia made. But even if he didn't, I would deny that motion. It is not duplicitous to charge both a substantive offense and an aiding and abetting offense under section 2 of the United States Code in the same count. Aiding and abetting is not a distinct offense from the underlying offense. It is simply a distinct way of committing the underlying charged offense. If you want a cite for that, it is United States v. Smith, 198 F.3d 377.

Nor is it duplicitous to charge multiple mailings or wire transmissions in a single count of mail fraud or wire fraud where there are multiple acts or part of a single continuing scheme. For that I would refer you to United States v. Aracri, 968 F.2d 1512.

The prohibition against duplicitous indictment is rooted in considerations of fairness and adequate notice to the

defendant. Particularly in the context of mail and wire fraud, where the mailing or transmission is essentially just a jurisdictional predicate, there is no unfairness to the defendant in charging multiple predicate acts within one overall scheme in a single count. That is United States v. Fruchter, 104 F.Supp.2d 289.

That is the motion to dismiss the indictment on duplicity grounds. I will come back to the motion to dismiss, because I think there will be some discussion with regard to the motion to dismiss the indictment on First Amendment grounds. I want to make sure I completely understand the parties' relative positions on that.

The motion to squash subpoenas issued to Mr. Ceglia's previous attorneys and to exclude documents produced in response thereto on the basis of misuse of the grand jury, it is my understanding that the government issued grand jury subpoenas after the indictment had been brought down by Mr. Ceglia.

I would deny that motion on the following basis. It is presumed that a post-indictment grand jury subpoena had a proper purpose. United States v. Sasso. That is 59 F.3d 341. Mr. Ceglia, under the relevant case law, must overcome the presumption with particularized proof that the subpoenas were issued chiefly for an improper purpose. United States v. Punn, 737 F.3d 1.

Mr. Ceglia has provided no proof of improper purpose, or to the extent the proof is provided, I find that is insufficient. As I understand it, what has been pointed to is the mere fact, temporal fact, that the subpoenas were issued after Mr. Ceglia was indicted. I also find that the case is distinguishable from the In re Grand Jury Subpoena Duces Tecum which is dated January 2, 1985, which is 767 F.2d 26. I will refer to that as the Simels case.

In that case, as I understand it, the government only issued a grand jury subpoena after its trial subpoena was challenged. Here that is not the case. I find that Mr. Ceglia has failed to overcome the presumption that the subpoenas had been issued for a proper purpose, so his motion is denied on that basis.

I should note that it is not unusual that the government might continue an investigation after initial indictment, whether that is in connection with trying to determine whether there are other defendants who might be brought into the case or whether or not there are other actual substantive charges that could be brought.

MR. MESSINA: If your Honor please?

THE COURT: Yes.

MR. MESSINA: One comment, if your Honor please. Do I take it from your Honor's ruling that the decision in the In re Grand Jury Subpoena Duces Tecum case that a grand jury subpoena

issued after the fact for the sole, dominating purpose of preparing an already pending indictment for trial is an insufficient showing as a matter of law or that that has not been made here?

THE COURT: I'm saying you didn't make a sufficient showing with particularized proof that the subpoena issued in this case is an abuse of the grand jury.

MR. MESSINA: We did in the submission to your Honor quote from Mr. Velamoor's brief, where he indicated that the subpoenas were issued for the purpose of providing evidence to the trial team. It was on that basis that we made the motion.

THE COURT: As I understand it, and maybe I'm wrong, Mr. Velamoor is the wall attorney. I don't know the exact quote, but I don't think it is unusual that there is a grand jury subpoena issued after an indictment has come down. As I understand the Simels case, it was after they issued a trial subpoena. They then followed it with a grand jury subpoena. That is not the situation here, as I understand it.

MR. MESSINA: It is not my intent to argue with your Honor. I just wanted to know that those were facts that you had taken into account.

THE COURT: Yes.

MR. MESSINA: Thank you.

THE COURT: The subpoena on Mr. Ceglia's behalf is still an open issue. We will get the briefing on that and I

will make a decision on that once the briefing is completed.

On the motion to suppress Mr. Ceglia's post-arrest statements, Mr. Fogg, Mr. Messina, as I understand it, there are either no such statements or there are no such statements that the government is planning on seeking to admit. Is there something I'm missing there? In other words, I don't believe there are any statements, so I was going to deny that request as moot. I just wanted to make sure factually I have that correct. Are there any statements that the government is seeking to admit?

MR. WILSON: No, your Honor.

THE COURT: Mr. Fogg, are there any statements that you are aware of that you believe the government is in possession of?

MR. FOGG: If there are no statements that the government wishes to submit, statements of my client, then I don't believe that there will be an issue, it is moot. However, if they do decide later on, I would like the opportunity to raise that.

THE COURT: I think under rule 16 if there are statements to the defendant made to law enforcement officers, they are required to be produced. Obviously, I would hear you on that with regard to their production and any motion you would have to suppress those statements, and I would also hear you on the issue of whether or not the statements have been

timely produced depending upon when they get produced. I will hear that issue if and when it comes up.

MR. FOGG: If and when, yes, Judge.

THE COURT: Now, on the motion for a bill of particulars, Mr. Patton had I believe made a motion on a bill of particulars. There is a question that I have. At the July 22nd conference, the government agreed with defense counsel, I think, that the government's theory was that Mr. Ceglia doctored page 1 and attached it to -- the line may have been yours, Mr. Fogg, but I think the government indicated they had nothing to add -- attached it to --

MR. FOGG: I'm sorry, your Honor. At that time I was not on the case.

THE COURT: I'm sorry. Then it must have been Mr. Patton. You're right.

MR. FOGG: Yes, your Honor.

THE COURT: -- the real page 2. On that basis Judge Carter denied the request for a bill of particulars with regard to this page 1/page 2 issue as moot. I would like to hear what the government's position with regard to page 2. I think in your memorandum of law, on page 25, note 7, there was an indication that the government represented in the brief that you have never taken a position on the authenticity of the second page of the contract that was put forward in the civil case.

MR. WILSON: Yes, your Honor. It may have been a misunderstanding of Judge Carter's that it would have been better if everyone had caught and corrected it at the time or it may just be a misunderstanding now. The government does not, has not, and it is not clear at this point that we ever will take a position on the question of whether page 2 was authentic and page 1 is forged and attached to the original page 2 or if page 2 is also a fabricated document that happens to exactly match the terms of what the government represents is the true contract. That is not a moot issue, your Honor. Although, we have other issues with it that I can take up or wait for Mr. Fogg to address.

THE COURT: I think I understand what you are saying. Let me characterize it in this way. You are not saying that literally he took the electronic page 2, at least the allegation, and then attached a page 1 to it. You are saying that is what happened, as opposed to maybe he retyped it, maybe someone else retyped it, who knows. The words may be the same, I don't know, I have not compared it, but you're saying with regard to authenticity it is in fact the same page 2 that was from the, I can't remember --

MR. WILSON: The StreetFax.

THE COURT: -- the StreetFax contract?

MR. WILSON: Not exactly, your Honor. There is in fact a physical contract that Mr. Ceglia presented in the civil

case that he represents as being what has been called the work-for-hire contract that he says is the authentic one. I think really Mr. Ceglia -- and I wasn't part of that case, I have just read the magistrate judge's report on it -- has at various times tried to argue that Facebook was selecting one of two theories, which was that the whole two-page document he has put forward is fabricated or the second page is original and only the first page is fabricated.

My understanding is that even in that civil action no one has ever said that it is just page 1 that is fabricated and just page 2 is authentic. The government doesn't believe that there is any reason why we are required or in all likelihood are going to select a theory. The relevant fact for purposes of this case is that in the course of the scheme to defraud the defendant presented a forged or fraudulent contract as a whole. The material terms which related to the ownership of Facebook are on page 1.

THE COURT: All right. I'll hear from Mr. Fogg/Mr. Messina.

MR. FOGG: Your Honor, if I may. The problem that comes up in the discussions with Mr. Patton, reading the previous submissions, I see vacillation. What I see is it is either page 1, it is page 2, it is the whole one, it is not the whole one. There are other cases presently pending before the Court of Appeals where there are certain allegations of only

page 1, and then it turns into page 2.

THE COURT: I'm sorry. You are referring to other a civil case? Specify exactly what you are referring to.

MR. FOGG: Yes, Judge. There was an injunction case in Buffalo which I was a part of. There was also the civil suit. Both of those cases are now pending before the Court of Appeals. Within responses to those, there have been indications of whether or not it's page 1 or page 2 or both. There have been other allegations. There is a lawsuit that just recently came out that was suing the attorneys for Mr. Ceglia where there was another presentment of a theory of what is and what is not.

In this particular case we weren't too sure what that meant in the transcript on that date in July. We didn't know what that truly meant. Before that, there was an indication that we were of the impression that page 2 was a copy of the original authenticated contract that Mr. Zuckerberg says it is and on page 1 were alterations.

If that is the case, Judge, we should probably just preclude the contract altogether. Otherwise, let's give me some understanding so I can prepare for this case. As I stated, there are several different tests depending on which position they take.

THE COURT: As I understand the government, the position they are taking is that the contract that was

submitted, which is a two-page contract, as I understand it, they are saying as a whole was fraudulent. You should correct me if I am wrong. In other words, there was never a contract, two-page contract, that contained the contents, the entire contents, of that contract that is at issue in this case.

What is going on in the civil case and positions taken by the civil attorneys or whatever, and I don't know what exactly is going on there, but I think what they are saying is with regard to the second page, the words may be the same as from the StreetFax contract, but the contract as a whole is what they are alleging is improper even though what they are saying is page 1 has material terms of the contract that they say are fraudulent.

MR. FOGG: Judge, if that is the case, then my request on the bill of particulars A through D would actually satisfy that issue. I understand the Court's interpretation of the government's position that they put forth today, which is different from what they put forth on previous days in this isolated case.

Excluding all other cases in the world, in this particular isolated case we were at one point page 1 and page 2 is a copy of, which tells me is that the signature is the same as Mr. Mark Zuckerberg. These are the things up we are looking for. I need to prepare a test. I need to hire experts, I need to hire witnesses, and they each require a different test.

THE COURT: I don't know whether the government is taking the position that it is or is not the signature. I don't even know if anybody is in the possession of the actual original contract so that the ink or whatever could be tested. I don't know.

I have your papers here. You mentioned your bill of particulars A through D. What are those requests?

MR. FOGG: Page 7, docket 113.

THE COURT: Page 7.

MR. FOGG: "A. State with specificity whether page 2 of the StreetFax is an original or authentic contract as alleged by the government.

"B. State with specificity whether the signature of Mark Elliot Zuckerberg appearing on the signature line of page 2 is an original or a copy of the authentic signature of mark Elliot Zuckerberg?

"C. State with specificity whether page 1 of the StreetFax is an original or a copy of authentic contract as alleged by the government.

"D. State with specificity whether the initials of Mark Elliot Zuckerberg appearing approximately mid page of the first column of page 1 is an original or a copy of the authentic initials of Mark Elliot Zuckerberg."

THE COURT: With regard to the first one, "State with specificity whether page 2 of the StreetFax contract is an

original or a copy of the authentic contract," I don't know what "an original" means in this context. Are you saying are the words are the same? You are asking whether he just took a copy of page 2 from the StreetFax contract and attached it to a page 1 that the government alleges are material terms that were just made up?

MR. FOGG: Judge, I would ask the government that question. The government should be explaining. They need to explain. I can't explain what I perceive they are trying to accuse my client of. I can't do that.

THE COURT: I think what they are saying is the overall contract is a fraud.

MR. FOGG: If page 1 is some sort of copy, I want to know that. Excuse me. If page 2 is some sort of copy of what they allege to be -- they say the StreetFax contract is an authentic contract. That's what they say. The StreetFax contract contains two pages, page 1 and page 2.

On the second page of the StreetFax contract, I have looked at it and I believe at one time in the complaint they actually said that Mr. Zuckerberg gave a statement that page 1 was the only thing that was changed. If that is the case, page 2 remains the same. Whether it is a scanned copy, a photostatic copy, a faxed copy, it is the same as the original. If that is the case, I want them to say that. I want them to state that. I need to know how to proceed to defend my client.

THE COURT: I'll hear from the government.

MR. FOGG: Thank you.

MR. WILSON: Your Honor, if I may. First of all, here is what the government has alleged. We have alleged a scheme to defraud in which the defendant maintained, falsely, that he had a contract to be the 50 percent or sometimes 80 percent, and I sometimes other percentages, owner of this. As part of that fraud, he submitted to the court and to various other parties a fraudulent contract that contained terms saying he was the 50 percent owner of Facebook, which was never a contract entered into and was a fabrication.

The government is not alleging a crime of fabricating or not fabricating page 2. It is not even alleging a crime of fabricating page 1. This is not a forgery case. This is a scheme to defraud. The defendant is not entitled to the exact theory of the case the government will pursue at trial or the particular arguments it will make about specific pieces of evidence as part of a bill of particulars.

Let me say this. He has the contract the government claims is authentic. That is the StreetFax contract that has been produced. He was the original source of the contract we claim is fraudulent. The terms of each of those two are what they are. It is clear by comparing them which terms are the same and which are different.

As to the physical status of the fraudulent contract,

the government does not think it has a burden to prove anything about that in particular, and it certainly doesn't think it is obligated to disclose anything about its views on that or concede any facts about that in advance of trial.

THE COURT: I am not sure I'm in a hundred percent agreement on that. I don't know whether there has been any expert disclosure or not. Do you plan on calling an expert? Again, I don't know whether there is literally an original or not.

MR. WILSON: To be clear, your Honor, there is a purported original that has been submitted by Mr. Ceglia in the civil case that is now in the government's position. I wouldn't claim that I know it is original. It is a forged document, so "original" has little meaning in that context.

THE COURT: All I'm asking is expert testimony with regard to the initial, with regard to the signatures, with regard to ink that was used. At this point is the government planning on calling an expert?

MR. WILSON: The government has not made a determination on that yet. One of the issues we would like to raise to your Honor is a deadline for expert disclosures. One issue is with respect to what the defendant claims to be unfairness here. If the defendant believes that it supports his innocence, that the signature is the same, he thinks that it is, he can call an expert to say that.

The government cannot be forced to stipulate to facts that he thinks are helpful so he doesn't have to prove it. He has no burden. The government will prove what it proves and not prove what it doesn't prove. But he can't force is into a stipulation as to particular pieces of evidence.

THE COURT: I do think the expert question will inform. The defendant doesn't have to bring forth any proof.

MR. WILSON: Of course, your Honor.

THE COURT: One thing that informs him is whether or not the government is going to call an expert. He still wouldn't be required to produce anybody, but he may want to consider getting an expert to at least have an expert on his side. Let's talk about timing of expert disclosure.

I think a lot, Mr. Fogg, of the things that you are referencing will be satisfied if you find out the government is retaining an expert in connection with page 2. As I understand it right now, with regard to the signature, whether it is original or whether it is not, as I understand it, and correct me if I'm wrong, the government hasn't made a determination about that or whether or not that is something they are going to try and prove one way or the other.

MR. WILSON: That is absolutely correct.

MR. FOGG: Your Honor, that's what is fascinating. If you hadn't done a test already, how could you determine in an indictment and present it to a grand jury to say it is

fraudulent anyway? If there has been no study or test done on it, then how could you say it's fraudulent?

There is an authentic contract. It is Mr. Ceglia's contract. I know that there is a difference. I see that. Right now I believe that question could be answered with their position as far as which scientist they will be seeking to prove what. But it still doesn't answer the question totally. I can only infer from their position as far as which scientists or experts they may use.

As a point of fact, they can always ask Zuckerberg's attorneys, who are present in court right now, they can always ask what they accuse Mr. Ceglia of doing.

THE COURT: It's irrelevant, quite frankly, what the civil attorneys believe and don't believe. What is relevant is going to be what evidence comes in in this case, what experts are used in this case, and what they say. As I understand it right now, neither side has decided whether to call experts with regard to the initials and signatures and the like. Whether or not either side decides to do that is up to them.

But you are entitled to disclosure from the government if they do intend to call experts. I want that disclosure to be sufficiently in advance of trial that we are not going to delay anything.

MR. WILSON: Your Honor, we had come today to propose some deadlines. One of those would be 60 days in advance of

the trial date for the expert disclosures, which would be March 5th.

THE COURT: Have you discussed that with Mr. Fogg?

MR. WILSON: We have not had a chance before.

THE COURT: Mr. Fogg, I know this is the first time you are hearing it. March 5th.

MR. FOGG: I would have to also take some action after I hear of that. I would be hoping for a few more days.

THE COURT: February 18th. OK?

MR. FOGG: February 18th for?

THE COURT: Their disclosure of experts. I haven't looked at the rule, but it should provide an understanding in general terms of what the expert will testify.

MS. GREENBERG: Of course, your Honor. I think that is required by the rule, and we will provide that.

Your Honor, to the extent there are going to be experts for the defense side that are only determined after seeing our disclosures, fair enough. But I think to the extent that the defense knows they intend to call experts, they are obligated to notify us. We request that those be made simultaneously.

I will particularly note in that respect, your Honor, that unlike the government, the defendant has litigated this issue, in particular the issues he is raising here, in the civil case and so should have some knowledge of who he intends

to call.

MR. FOGG: Actually, Judge, the government has litigated this issue in New York. The U.S. Attorney's office was litigating the issue in New York and still are on appeal.

As far as my client testifying --

THE COURT: In a criminal case?

MR. FOGG: Not in a criminal case, no.

THE COURT: In a civil case?

MR. FOGG: In a civil case, Judge, in the injunction case which involved the criminal case.

THE COURT: All right. I'm sorry. Go ahead.

MR. FOGG: The issue is our right to whether or not we would like to testify, whether or not we would like to bring forth our own evidence. We haven't done that yet. Like the Court said, if we see the experts, then we may want to challenge it.

THE COURT: The government's request goes to whether there are experts that you know you are going to call. In that case, you should disclose them.

MR. FOGG: Should we review the experts that the defense discloses, and once we make the decision --

THE COURT: Why don't we say March 5th.

MR. FOGG: March 5th would be fine, Judge.

THE COURT: Then we will come back. I think that will go a long way to resolving the issue with regard to these

particular bill of particulars requests. In my view, that would resolve it. As the government has stated, their theory is that it is a two-page contract and the contract, as part of a scheme to defraud, was being utilized in that fashion.

With regard to the motion for the bill of particulars, I am denying that at this time. If there is a need to revisit it, we can revisit that at a future date.

I think I may have skipped over. Or did I? Did I already deal with the nontestifying co-conspirators?

MR. FOGG: No, you have not. I guess that is another question to ask.

THE COURT: As I understand it, the government has not alleged that there is a conspiracy. Does the government intend to submit statements of others under the theory that they are co-conspirators?

MR. WILSON: Not at the present time, your Honor. If we discover that that is going to change, we will immediately inform the Court and move on that issue.

THE COURT: Mr. Fogg, to the extent that changes similarly with regard to the post-arrest statements, I will hear you at that time, if the government's position does change. Also at that time I will hear from you on how that evidence might get presented. By that I mean as an evidentiary matter how I would proceed at trial with regard to any co-conspirator statements.

MR. FOGG: Judge, time period of notice? I would hate to have notice at the eleventh hour.

THE COURT: You mean notice about whether there are co-conspirators from whom they are going to offer testimony?

MR. FOGG: And statements, Judge, yes.

THE COURT: Here is the problem with the statements. Aren't the statements nontestifying? OK.

MR. WILSON: Your Honor, maybe it makes sense to jump into the middle of setting some deadlines right now, since it keeps coming up.

THE COURT: Yes.

MR. WILSON: The government would propose that anything along those lines be closed in the form of a motion in limine by the government, and then Mr. Fogg will have a chance to respond. As you know, right now, your Honor, there is no conspiracy alleged, so there are no co-conspirators. I suspect this issue is going to be moot.

To the extent there are co-conspirators and we are going to seek to introduce testimony or evidence about their statements when they are not testifying, I think it is probably most efficient to do it. We had been thinking about motions in limine on April 15th, but depending on when your Honor wants to set a final pretrial conference. That will give us a few weeks, two and a half, three weeks, to address all these issues.

THE COURT: I'm thinking that maybe we need a little bit more. Co-conspirator statements is a little different. I would hope by then you will have an idea.

MR. WILSON: Your Honor, I think it is vanishingly unlikely that we are going to be seeking to identify someone as a co-conspirator in this case and then introduce their statements on that basis.

THE COURT: The date you proposed?

MR. WILSON: Was April 15th, your Honor.

THE COURT: I'm going to push that up. April 1st. Only real motions, no joke motions. That is for motions in limine.

I recognize that things may come up during the trial. While I understand that this is the date I'm setting for motions in limine, I anticipate that I will probably be getting letter briefs during the trial with regard to specific pieces of evidence as statements come in. But I want the real motions in limine set with regard to what you would expect.

With regard to 404(b), I want the motions with regard to that. With regard to 609, I would want to get the motions that you know in advance for evidence that you know you are going to put in that would typically be done on a motion in limine.

While we are on timing, Brady, Giglio, Jencks Act, what is the government's intention with regard to that? I

apologize, you may have already gone over this with Judge Carter. I read through the transcript, but I don't remember seeing a date.

MR. WILSON: We haven't, your Honor. With respect to Brady, of course, the government will produce it as we learn of it, in conformance with our standard obligations.

Respect to both Giglio and 3500 at this point, the office intends, as is our normal default practice, to produce it the Friday before trial. As we get closer, if we discover there is an unusually large amount of 3500 or Giglio in this case, which I think we are not anticipating at this point, we will confer with defense counsel and make arrangements to provide it sooner if that is going to be required for them to effectively review it.

At this point, at least, your Honor, we believe that the Friday before trial, as usual, is appropriate and is what we would intend to do.

MR. FOGG: What is the trial date, Judge?

THE COURT: May 4th.

MR. WILSON: Yes, your Honor.

MR. FOGG: That's what day?

THE COURT: That is Monday, Monday the 4th.

MR. FOGG: So over the weekend?

THE COURT: Hold on. We are not done yet. As you know, Mr. Fogg, I don't under the rule have the ability to

compel it earlier. Rather than coming back, what I would suggest is this. The trial starts May 4th. I don't know how voluminous the 3500 material is going to be.

If the government could produce starting on Friday, April 4th, the witnesses you anticipate conceivably for that first week, at a minimum for the first week of trial, that obviates Mr. Fogg's concern that in addition to preparing an opening and doing whatever, he is going to now maybe get a whole bunch of 3500 material at that time.

MR. WILSON: Your Honor, I think we may want to come back to you on one issue that immediately occurs to me. I don't think, given the pattern in this case, we are going to be comfortable simply turning 3500 over without an enhanced protective order as to the 3500. That is not the final position of the government, it is my suspicion.

If we can confer with Mr. Fogg, then we will write the Court. We may come back and say we actually think that is too much time. I don't want to commit to this yet, your Honor. I think we will work towards that in principle.

THE COURT: Think about it. I don't know exactly what the government's concerns may or may not be. There may be certain restrictions that could be date restrictions that are lifted after a certain period of time going forward.

That raises another issue that I wanted to raise with the parties with regard to the documents that have been marked

in this case. As I understand it, certain of the documents have been stamped confidential.

MR. WILSON: Correct, Judge.

THE COURT: I don't know whether the parties have discussed what their intention is when those documents are being offered in court.

MR. WILSON: Your Honor, I think the current protective order does not cover trial. Absent some additional action by the parties, and the government obviously has a standard practice for looking at these matters, we would not anticipate any restrictions on them once they are being put forward as trial exhibits.

THE COURT: My initial view is that there would be none. I think the parties need to talk about how they are going to offer these documents. To the extent possible, I would rather avoid the need to have some sort of curative instruction about why they are stamped "confidential." I don't know whether it is possible to redact that or what you would do.

MR. WILSON: Your Honor, we will look at the various options. We will probably just use versions that are not marked confidential at trial. But we will confer with defense counsel.

THE COURT: Yes. There may be documents that have been marked on both sides that they do wish to be confidential.

To the extent there is personal identifying information, that is a separate issue. What I'm talking about are just general trial exhibits.

This is not a civil case. It is not a trade secrets case. This is a criminal case. The public has a right to have access to certain things. I will hear you on a document-by-document basis. That was one of the issues I wanted to raise as a general matter.

MR. MESSINA: If your Honor please?

THE COURT: Yes.

MR. MESSINA: Your Honor, the protective order is a one-way street. The government can mark whatever it deems appropriate confidential. For the defendants, of course, there is no term in that protective order with respect to that.

All of the Zuckerberg emails that have been produced, including those that he did while he was employed by Mr. Ceglia and relate exclusively to work that he did for Mr. Ceglia, that are more than 10 years old and have no commercial value and no legitimate basis for nondisclosure, have all been marked confidential. We have a problem with that.

In particular, we have before your Honor today this issue about one email that relates to work that was done on August 18, 2003, I believe, that we would like to have released from the confidentiality designation. I don't know if that is on your Honor's agenda, but we haven't been able to reach an

agreement on that.

THE COURT: One of the reasons I was raising the confidentiality issue is because my view is if a document is going to be used in connection with the trial, it is not confidential. It is coming in, it is a physical exhibit, it is being offered. Whether you have to come off the designation or whether you just say that the exhibits marked are only used in connection with this litigation, whatever it is, the parties need to consider, both sides, what documents you are going to use and how that is impacted by the confidentiality agreement between the parties, and come some sort of resolution.

With regard to documents currently marked confidential, aside from motion practice where you might want to submit documents for my review, at this time why do you need the government to go through and -- if there are specific documents, I guess you can talk to them about that. Why do they need to at this juncture remove the confidentiality? In other words, what use do you want to put it to other than to submit motions here?

MR. MESSINA: As a practical matter, if the documents are going to be used during the trial and they are going to be publicly aired, I don't view that as an issue. We do have one document, though, where that is an issue, and indeed it is contemplated by the protective order that if there is a dispute, the parties would in good faith and the government

will recognize it has an obligation not to keep things secret that aren't supposed to be kept secret.

We have one document. I will be candid with the Court about this. We have one document in this case. And I am one of the attorneys on the civil action, the injunction action and the civil action that is before the Second Circuit right now. There is one email that I mentioned, the August a 18, 2013 email, that should have, in our view, unquestionably have been produced in the civil case.

We believe that it is important to bring that document to the attention of the Second Circuit because it indicates, contrary to representations that were made by Zuckerberg and Facebook in the district court in Buffalo, that he had a contract, he made a contract, and he sent a contract to Mr. Ceglia. That is what that email indicates.

We believe it is important that the Second Circuit know that, because none of this information was produced, nor was that email, in the case below.

One last point.

THE COURT: Go ahead.

MR. MESSINA: The protective order says, as all the ones I have seen do, it can only be used in connection with this litigation. If your Honor is disinclined or reluctant to order the release of that email from the confidentiality designation, I would at least ask for leave to be able to

present it to the Second Circuit under seal.

THE COURT: Have the government and defense been able to talk about just this particular email?

MR. WILSON: Your Honor, this is the email that was submitted in violation of the confidentiality order.

THE COURT: I understand.

MR. WILSON: And came off it. We had a conversation about it at that time. We had a conversation about this particular issue, I think it was early last week, at which time we were first alerted that apparently this email had been shared with the civil lawyers handling Mr. Ceglia's case, which was another violation of the confidentiality order. At that time we asked Mr. Fogg to put in writing if he was requesting it under the confidentiality order or whatever he wanted to do.

We got that late on Friday. Maybe it was midday on Friday. I think we then replied, saying we would look at the issue this week and ask for any authority he had. We never got any authority on why this would be appropriate. We still have it under consideration.

I think at this point we would be happy to try and have a final conversation. I frankly don't anticipate we are going to reach a resolution, and they can submit the issue to your Honor.

THE COURT: I want to know by a week from today.

MR. WILSON: We won't even need that much, your Honor.

A week would be great.

If I can make one point that I do want to raise on this issue?

THE COURT: Go ahead. Then I have a question.

MR. WILSON: Your Honor, first of all, it is not really about releasing the confidentiality designation. The confidentiality designation applies only for purposes of the protective order. No one does anything with this until they have either agreed with the government or come to the Court to have a resolution. There is no question that they are entitled, whether or not we agree once we have had a good faith conversation, to submit to the Court requesting it.

THE COURT: Sure.

MR. WILSON: The issue here, your Honor, seems to be that the very purpose of the protective order, as in so many of these, is to avoid people using the discovery process in the criminal case for other issues, for example, to circumvent civil discovery.

I don't think the protective order precludes the defendant in this case, who is plainly a party to both, from submitting whatever the appropriate avenue would be saying that there is a document that in these general terms is X, Y, and Z that he has become aware of that should have been produced and seeking whatever relief he wants. The government doesn't have an objection to that.

But this is criminal discovery that is not broadly available to Mr. Ceglia to file in his civil litigation.

THE COURT: Here is the issue with regard to this specific document, not with regard to everything. I recognize that going through everything would be extremely time-consuming. With regard to this specific document, I understand the issue of only used in the criminal case versus used otherwise. But there are other reasons for to have confidentiality, other reasons why these things have been stamped confidential. Correct me if I'm wrong about that.

MR. WILSON: No, your Honor. I can give it to you in two seconds. The broader issue here, your Honor, is the victim in this case is private email. He is a public figure. There is substantial press and public interest in his life. Based on past experience, there is a concern, I'm sure by him but more importantly by the government on behalf of the interests of the victim here, that his public business not be broadcast to the world by Mr. Ceglia, who has attempted to defraud him and has a significant interest in compounding this by finding anything unflattering in those emails and publicizing it to the world. That is the core concern with his emails generally.

THE COURT: With regard to this specific email, what I would like you to do is take a look at the contents of the email. Think about the protective order and why it was entered into, what the terms of the protective order are, and figure

out the government's view, twofold, whether you view it as confidential in content under the protective order or whether you view it as confidential and the argument is that it should just be used in connection with this litigation.

That is what I would like you to consider. In whatever submission you make, I would like to get your views on both of those issues. OK?

MR. WILSON: Yes, your Honor.

MR. FOGG: That is one week, Judge?

THE COURT: Yes. Let me ask this. Was this document shared with the civil lawyers?

MR. FOGG: No, it was not, Judge.

THE COURT: Other than, obviously, both of you are involved. I understand that.

MR. FOGG: That's correct. We both are involved and we both represent Mr. Ceglia. I'm not on that case, the civil case, at all. I was on the injunction case and I was part of the whole proceedings that was going on in Buffalo in tandem. As a matter of fact, I live in Buffalo.

THE COURT: The only thing I'm concerned with is whether ît was shared.

MR. FOGG: Between Gil and myself, and Mr. May, who is also part of Gil's office.

MR. WILSON: Your Honor, to be clear, the problem here is that Mr. Messina, despite having filed here pro hac vice,

certainly before today and even today, wasn't counsel of record in the criminal case. He is the counsel of record in the civil case.

Putting your civil lawyer onto your criminal team so that he gets access doesn't really solve the government's problem. Maybe that is something we need to revisit with the protective order. But I think it is plainly contrary to the order in technical terms, because Mr. Messina was not counsel of record, and certainly in the spirit of the thing.

THE COURT: I will hear from Ms. Echenberg and then from you.

MS. ECHENBERG: I want to give a little bit of a historical perspective also. When the defendant agreed to this protective order, he was represented by David Patton of the Federal Defenders. There was no civil attorney at all on the case.

When Mr. Fogg came on the case and we were talking about whether an adjournment was necessary, I made a point to the Court that it was my understanding that he had some involvement in the civil case. He corrected me and said no, he did not have involvement in the civil case, only in the injunction, that he had no knowledge of what was happening in the civil case.

We had proceeded under the understanding that there was a true separation between the civil case and the criminal

case. Mr. Messina has sat at counsel table at prior appearances. I have asked him on multiple occasions if he was entering an appearance in this case. He said that he intended to but he hadn't until today.

To give your Honor some context, we do have some concerns that there is some overlap that was not intended when the parties had agreed to this protective order.

THE COURT: Mr. Messina, as I understand it, are you going to be counsel and trying this case with Mr. Fogg?

MR. MESSINA: I will, your Honor. The protective order is not as limited as my colleagues have indicated. It is not only for counsel of record but also those who are assisting Mr. Fogg, as I have been right long, who have a retainer agreement with Mr. Ceglia, which I did and do.

MR. FOGG: Your Honor, Ms. Echenberg's statements are correct. The first day was in September. I appeared with Mr. Messina and Mr. Ceglia. We appeared and announced ourselves on the record. At every appearance thereafter, which has only been a few, Mr. Messina has been by my side.

The court, Judge Carter, asked specifically whether or not he would be on the case, and he did say he was. That was prior to that. Procedurally, he has just now gotten the notice of appearance, only because I had to pester him and remind him, and also Ms. Echenberg has also brought that up through some other communications.

THE COURT: To be clear, you are in the case. Again, I haven't looked at the protective order to even think about this issue, but the parties should think about that in connection with going forward. Again, it is in this litigation.

I'm not sure if there is a way to avoid, if you see something, saying I want to use this. I don't that necessarily there is a way to avoid that. I will leave it at that. I may have a question in the future, but right now I'll just leave it at that. You need to get your appropriate pro hac papers in immediately.

MR. MESSINA: I will have the papers for your Honor on Monday.

THE COURT: Let's try and get through. I'm on a bench trial and trying to get back to that. We have done co-conspirators, we have done bill of particulars. Are there any informants?

MR. WILSON: No, your Honor.

THE COURT: That is denied. There is no indication that there are any informants in the case. In any case, rule 16 does not require that the government furnish the name of any witnesses, least of all confidential informants, absent a specific showing of materiality.

With regard to supplemental discovery, my understanding is that the government has indicated it will

provide the discovery, supplemental discovery, as it gets it, as it realizes it is going to use it at trial. Is that right?

MR. WILSON: Correct.

THE COURT: Let me ask this, Ms. Echenberg and Mr. Wilson. Do you have discovery currently in your possession that you have not turned over that you intend to utilize?

MS. ECHENBERG: No, your Honor.

THE COURT: All right. I will deny that at this time. The government has indicated on the record here that they don't currently have any discovery in their possession that they intend to turn over and utilize at trial.

We have dealt with the motions for Brady, Giglio, and Jencks.

With regard to the rough notes and the like, my understanding is that the government has represented that the agents and personnel have been instructed to retain and preserve documents.

MR. WILSON: Correct, your Honor.

THE COURT: Mr. Fogg/Mr. Messina, is there anything else you need in that regard? They can and should maintain evidence. There is litigation pending. Is there anything else you think I need to do with regard to that?

MR. FOGG: Would that be turned over at the same time as Giglio and Jencks?

THE COURT: I assume if there are going to be agents

who will testify and it is Jencks Act material, they will turn it over.

MR. WILSON: Your Honor, to the extent the notes are Giglio or Jencks, they will be turned over with Giglio or Jencks. To the extent they are not otherwise discoverable, I take the defendants to be asking for them and the government's position is he doesn't get them. The mere fact that they are notes doesn't confer some other requirement to turn them over.

THE COURT: Mr. Fogg, what I hear the government saying is if there are people who they are not calling as witnesses who may have been involved in the investigation in some way who have some notes, if it doesn't have Giglio in it, they are not going to be turning it over. If you have at some future date specific applications you want to make because they are individuals, I will hear you on that. But as a general matter, I don't believe that they are required to turn that over.

Grand jury transcripts. Let me ask this, Mr. Fogg. Besides the desire to get the grand jury minutes, what is the basis? I didn't really see it in your papers. As I read the law, you have to establish a particularized need for the grand jury materials.

MR. FOGG: Yes, Judge. As I first stated previously, if the grand jury is based on simply a mere allegation that, hey, the contract is a fraud, without any proof of some

fraudulent action or characteristics, I would say that there would be a problem with sufficiency. If the grand jury testimony is based on improper testimony or the absence of a key witness to actually give the proffered information, I would say there is a problem with legal sufficiency.

If in fact there is something to that effect, which I state that there is, then I would ask, Judge, that the Court review them in camera and come to a decision as far as their release.

THE COURT: I don't think there is a requirement under the law absent a particularized need shown by the defendant. I haven't seen anything with regard that, with regard to the grand jury minutes. The grand jury reviews the materials the government puts forth in front of the grand jury. I don't think the government is obligated to put every witness before the grand jury. In fact, the law provides, at least federally, that the government can utilize hearsay evidence in the grand jury proceeding.

In this matter, I don't believe that there is any particularized need for disclosure that's been developed by the defense or that there has been any sort of misconduct before the grand jury. So, at this time I'm denying that request for the grand jury transcripts.

Voir dire and experts. I think we have a schedule for expert disclosure, so I'm not going to rule on that at this

stage. We can take that up once you get notice of what, if any, experts each side is going to call. I don't believe there are any recordings in this case.

MR. WILSON: There are a handful of prison calls which the government has produced. I don't think at this point we anticipate using any of them, your Honor. If we do, we will flag it a little bit early for Mr. Fogg so he can make sure that he is content with the audibility.

THE COURT: They have been produced?

MR. WILSON: Yes, your Honor.

THE COURT: Mr. Fogg, this is what I would suggest. Audibility is can you hear them. I don't know. I haven't listened to these tapes. I have no idea whether you can hear what is being said or not. You can wait. As I hear the government, they haven't decided whether or not they are going to use them.

If you believe there is an issue about audibility, I don't know how many tapes there are and I don't want to create work for you, but if there are only a handful, you can listen to them. That way we can tee up the audibility issue and maybe even the issue about whether or not they are going to be used. At this stage it doesn't sound like, although they have been turned over, the government intends to use them.

As I mentioned, there may be in limine type motions that get made during trial, and there is a date for in limine

motions that we have set in this matter already. With regard to other motions, I'm denying that request absent leave showing good cause. Right now there have been motions that have been filed by Mr. Patton, there have been motions there have been filed by you, Mr. Fogg, in connection with this.

I'm not saying you can't file. What I'm saying is this isn't going to be a parade of motions. I want to hear in advance what the motion would be, and then I'll decide whether or not to grant leave to file the motions. Quite frankly, I think that serves your purposes also. If you file the motion and create a 10-page brief, I may decide not to even consider the motion, because it is too late. OK?

MR. FOGG: That will be fine, your Honor.

Judge, we spoke of those issues that are still outstanding that the Court will reserve. Those are the only things on which I would say a motion might be made, but I doubt as much. I think we are covering everything, unless of course some other issue arises that I would in good faith address the Court.

THE COURT: I understand things come up, maybe some supplemental discovery that may cause you to want to make a motion. I understand that. I'm just saying I want to hear about it in advance.

In my civil practice, if there is a motion that you would like to make, it will be like a pre-motion letter. You

have three pages to tell me what the motion is. The government has three business days to respond. Then I will take the issue up probably in a phone conference concerning whether or not I think the motion can be filed.

I think with regard to pretrial motions, I understand that there may be evidentiary issues that you are going to raise. This is separate and apart from that. All right?

MR. FOGG: Yes, Judge.

THE COURT: I think the only thing left is the motion relating to Noerr-Pennington. Am I correct on that?

MR. WILSON: I think so, yes, your Honor.

THE COURT: As I understand it, and I want to make sure that I am correct on this, neither side has filed a criminal case where the Noerr-Pennington doctrine has been utilized. Government?

MR. WILSON: That's correct, your Honor. As far as the government knows, that is an open question.

THE COURT: Mr. Fogg?

MR. MESSINA: If I may, your Honor?

THE COURT: Yes.

MR. MESSINA: The answer to that question is we have not specifically or directly found such a case. However, if I can make one clarifying statement.

THE COURT: OK.

MR. MESSINA: Noerr-Pennington has, as the Court

knows, been expanded well beyond the antitrust context, and there are cases out of this circuit that say it can be applicable in any context appropriately. Noerr-Pennington arose in the antitrust context. The antitrust context was primarily and has been primarily a criminal statute.

THE COURT: I understand that antitrust law can be done other criminally or civilly. But in the cases that it has been utilized in, as I understand it, in the antitrust context they have all been civil cases.

MR. MESSINA: Those cases that we have found have all been civil cases. The point that I want to make is the reason why there may be a dearth of authority, or perhaps even complete absence of authority, and the reason why this may be a case of first impression is because there have been no criminal prosecutions brought where there is a Noerr-Pennington immunity. If you dovetail that with the argument that was made before Judge Carter previously under Pendergraft, it seems to me pretty clear that that would be an empty exercise.

THE COURT: My question is this. This is just me thinking off the top of my head. I don't know whether there have been cases where there is an allegation that the entire litigation was fraudulent, but certainly there are cases where individuals have been charged with perjury in connection with civil cases.

I hear what you are saying. I'm just not sure in that

context whether the perjury that might be involved could be considered in the whole litigation. It hasn't been raised criminally, but that doesn't mean the factual situation where an attorney could come up with the idea hasn't been brought forth.

MR. MESSINA: Right. There is an obvious distinction between the perjury case and a criminal case brought because the underlying action was objectively based. It is a pretty high standard, and it is completely different in many material respects from a perjury charge.

THE COURT: It can be, depending. If, for example, there is a verified complaint signed by the client or an affidavit as the basis of the complaint, or whatever -- I understand what you are saying.

MR. FOGG: Your Honor, if I may, I would like to let you know that In re Richard Roe 2 and Richard Roe 1 were actually criminal cases. They came out and became criminal cases. They were cases in which the defendant was accused of inciting litigation. That case was then dropped.

So, it was born out of a criminal case; however, it went on to be one with regard to the grand jury. Even though it never got a chance to be addressed as a criminal case, it never nourished as a criminal case, the same actions came out of that case.

THE COURT: My question is, is there any guidance for

me?

MR. FOGG: No, Judge, outside of the plethora of case history from the Supreme Court. It tells you, first of all, that in civil litigation you have immunity. And if you've got immunity, then you have to determine sham.

Outside that guidance, I cannot see a case, and the government has not pointed to a case, where they have prosecuted someone solely on the basis of filing litigation. They have not done that. And we can't find a case where they have actually made that prosecution.

THE COURT: A couple of things. This motion had already been made and decided by Judge Carter. The time for reconsideration had passed. Let me review what I understand Judge Carter said at a March 7th conference. He stated follows.

"Both sides seem to agree that the Noerr-Pennington doctrine shields litigation activity in a commercial context except where litigation is a sham. The government asserts that the litigation is in fact a sham and that Ceglia is not entitled to immunity as a result.

"Ceglia, in turn, has urged me to hold a hearing, and I have determined that I am not going to hold such a hearing. It does appear to me that if Noerr- Pennington immunity is something I'm going to have to determine, it would be more appropriately raised at the end of the trial once all of the

evidence is in.

"It is inappropriate for me to make factual determinations about the government's evidence at this early stage. Therefore, Ceglia's motion to dismiss the indictment is denied."

That was from the March 7th conference.

On a procedural matter -- and then I'll give you an opportunity, Mr. Fogg/Mr. Messina, to be heard on this particular issue -- "Pursuant to local criminal rule 49.1, any motion for reconsideration must be filed within 14 days of the court's determination of the original motion and must "set forth concisely the matters or controlling decisions which counsel believes the court has overlooked?"

Mr. Ceglia's December 18th motion to dismiss on First Amendment grounds is, in substance, precisely the same motion as Mr. Ceglia made through his previous counsel, and Judge Carter denied that motion on March 7th. It is therefore a motion for reconsideration, comes well after the 14-day deadline, and does not identify any facts or controlling decisions that Judge Carter ostensibly overlooked.

Mr. Ceglia's motion to dismiss can therefore be denied as untimely and not in conformity with rule 49.1, and it would be dismissed on that basis.

Mr. Fogg, this may be putting the horse behind the cart, so to speak. I didn't see anything that Judge Carter

overlooked or missed that you identified in your papers. Is there anything that you believe is a controlling case or something that Judge Carter overlooked? He had your briefs. Was a there some case or something you believe he did not consider?

MR. MESSINA: Thank you, your Honor. The initial motion that was brought before Judge Carter was based primarily upon U.S. v. Pendergraft at 18-1001(b). It was not focused on the First Amendment. Judge Carter was concerned, as your Honor is concerned, about the applicability of this argument in a First Amendment context and in a criminal case.

We have indicated and cited in document 120, which is our reply memorandum of law, references to the First Amendment right to petition as it interrelates with Noerr-Pennington. That is the Matsushita case, Matsushita v. Loral Corp. After saying that there is the First Amendment right to petition, it goes into whether or not the underlying litigation was objectively baseless.

We think there is a correlation between those two that Judge Carter did not address. He essentially said from the bench that he didn't feel that he had enough information at that time to address.

This is not really a digression, your Honor, but it is sensitive from my perspective because I have never done this before. Judge Carter has recused himself from this case. I

understand he has done it on some conflict basis. I don't know what that conflict is. I don't know when it started. I don't know whether it implicates any of these decisions that he has made. But if he felt it necessary to recuse himself and have your Honor sit in his stead in this case --

THE COURT: By the way, it is not in his stead. I am the judge on this case.

MR. MESSINA: Understood. I didn't mean to denigrate your position.

THE COURT: It's fine. It has been transferred to me.

MR. MESSINA: Transferred. The question becomes whether or not this defendant is therefore entitled to have these motions reviewed de novo or perhaps even made again. I don't think that this is necessary. But this is an important enough motion where additional cases have been submitted to your Honor and there is an indication that the courts are moving in this direction to protect First Amendment right.

Once that First Amendment right is impaired to the extent that a defendant who should not have to stand trial under the Constitution is forced to stand trial and then to have his rights vitiated, if you will, or the violation of his rights vitiated after the trial, that is irreparable harm which he should not have to undergo.

I would respectfully request that this motion in its entirety be reviewed by your Honor de novo. If your Honor is

inclined to go ahead and deny the motion, we haven't made a firm decision on this, but we may move to stay in order to take that up to the Second Circuit.

THE COURT: First, let me deal with the issue of recusal. A judge can decide to have a case transferred for whatever reason he or she wants. There had been issues raised by the defense with regard to several of Judge Carter's law clerks and their one affiliation or the other. It had nothing to do with the motions. What it had to do with was Judge Carter reviewing his docket and deciding it would be better for his docket if the case was transferred to another judge. That is why I have the case.

Although, quite frankly, the time is running late, I am going to deal with the substance of the motion. I was planning on doing it from the bench. I will write something in light of your comments here today. Again, I'm not entirely clear that this is something that you could take up, but it is something that you could do.

The one question I do have for you is once the determination is made that the indictment itself has passed muster, what additional steps do you perceive that a court is obligated to then take on? There are other cases where the First Amendment is implicated, where someone has made certain statements, for example, statements that might be viewed as threats, indictments in those cases?

My question is, after the determination has been made that the indictment is sufficient, and maybe you pointed this out in your briefing, what is it in addition to that that you feel is necessary? Again, I will write something on this for the parties.

MR. FOGG: Your Honor, if I may?

THE COURT: Yes.

MR. FOGG: Judge, I never intended the motion to be a motion for reconsideration. I do know the time restrictions. That was not the point. The point was simply that the judge had made a decision, as he did for other decisions, to deny but with the thought of we may revisit. Here it is denied, but you can bring that up after trial. If immunity is truly immunity, then why are we here for trial? That was the basis of that, and there were two instances of why I did that.

THE COURT: But as I read Noerr-Pennington, it is immunity from liability.

MR. FOGG: Liability from what, Judge?

THE COURT: It is in the civil context. It is liability in connection with a civil case. In other words, you can't bring the suit --

MR. FOGG: The Supreme Court has never limited the immunity on that. They have never limited it. In this district itself, that was the other issue. The other issue was the Matsushita case. That case, Judge, is actually controlling

right here. We have had other cases, PRE cases. I have cited all the cases, Judge.

Based on that notion, Judge, especially that one case, and the fact that Judge Carter, not your Honor but Judge Carter, had made the statement that there are triable issues of fact, a grand jury will decide whether there is probable cause --

THE COURT: There is no summary judgment in criminal cases.

MR. FOGG: There isn't, Judge. What I'm saying is the probable cause basis is probable cause whether it is civil or criminal. The probable cause in a criminal case is whether or not there is probable cause to believe that a crime was committed and that the defendant committed it. That is its basic terms.

The probable cause that would have to be determined under sham is whether no reasonable litigant would have an objective basis to actually bring this case. That is different. It is not whether or not there is probable cause that there is a sham, because that is not what it is. It is probable because whether it is objectively baseless.

THE COURT: Here the criminal statute is mail fraud/ wire fraud. The government has alleged that there was a scheme to defraud. It is not the same. I understand what you are saying, but it is not the same thing. Conceptually, I

understand what you are saying. As I said, we are going to write on that. You will have a decision.

MR. FOGG: The only thing I would ask your Honor, I'm sorry, based on that notion is if that is the case and we go for it, that we preclude all statements regarding litigation. If that is the case, Judge, because litigation, documentation, and activity is immune unless you, your Honor, lift the immunity by declaring it's a sham, that's what the Supreme Court has said, if that's the case, then the litigation activity should not even be a part of this case and be precluded.

THE COURT: It is a criminal matter. At this time I'm not going to do that. I don't see a basis to do that. I haven't really thought about it. It sounds like an in limine motion. If you want to make it as an in limine motion, that's fine.

It sounds like you are saying you shouldn't be able to introduce evidence that there was a prior litigation that this was based on. I haven't thought about that, but that sounds evidentiary to me. That sounds like it is a motion in limine. I have set the timing issue, and I was planning on addressing Noerr-Pennington, the substantive issue, and I will do that in a decision.

THE DEFENDANT: Could I have a question, your Honor?

THE COURT: I hesitate to say this. I would say you

can, but I don't think you should.

THE DEFENDANT: I appreciate it.

THE COURT: How about this. Your lawyers are here.

THE DEFENDANT: I'm OK, your Honor. I appreciate the advance warning. I recognize that the government will be hearing my every word.

THE COURT: You don't have to say anything. Anything you say here without consulting your lawyer -- I think you should speak to your lawyer. OK? What I'm saying to you -- and Mr. Fogg, you can speak with your client -- I think it is better if you don't say anything, because you can't unring a bell. OK?

THE DEFENDANT: Thank you, your Honor.

MR. WILSON: Your Honor, could I briefly address, since you are going to address the merits of this? I understand you have a time constraint, so I will do it extremely quickly.

THE COURT: Yes.

MR. WILSON: A couple of quick points. First, I think there is a real question here as to whether Noerr-Pennington ever applies in the criminal context or at least to these statutes. I think the statement that there has been no case like that is just wrong.

It is not in our current briefing, because it was in the last round of briefing. We cited a number of cases of

similar prosecutions, in particular Eisen, which is a Second Circuit case that affirmed that. It is all in the briefing if your Honor thinks that is germane. I just wanted to make that clear.

THE COURT: We will consider all the briefing on that.

MR. WILSON: The other quick issues. First of all, to be very clear, there is no absolutely no basis for the notion that this is a preliminary issue that comes before trial except, if it can be addressed, it's only in the civil context, but on a motion to dismiss or summary judgment, like any other issue.

To give you the case, and it is on page 13 of our brief in footnote 5, it is California Motor Transport Company v. Trucking Limited. There the Supreme Court overturned a dismissal, I think it was actually a grant of summary judgment, on the Noerr-Pennington issue and remanded it for trial. At the end of trial, you can come out either way. If Noerr-Pennington applies, a jury might have to be instructed on it. But it is an issue for the fact-finder like everything else.

One other issue, your Honor. This goes to the reconsideration standard but also to the merits. The cases that they have cited here I think are not on point, and your Honor I'm sure has reviewed them or will review them.

More to the point they are district court cases, they are not controlling. The controlling case in this area in the

Second Circuit is In re DDAVP Direct Purchaser Antitrust Litigation, 585 F.3d 677. It is cited in our brief. That is a Second Circuit case which was an antitrust action, civil of course, brought by essentially customers of a prescription drug patent holder.

The patent had been procured by fraud. They sued for, among other things, the patent holder filing infringement litigation against generic drug makers on the basis of this fraudulently acquired patent. The Second Circuit expressly found that that that type of litigation constituted sham litigation because of the underlying fraud.

That is controlling, it is on point, it is inescapable. Your Honor, in the government's view there is no reason certainly at this stage to reach the question of whether Noerr-Pennington could apply to the mail fraud statute, because it is indisputable that the issues here fall squarely within what has already been found to be sham litigation if Noerr-Pennington did apply by the Second Circuit.

THE DEFENDANT: I dispute that.

THE COURT: Mr. Ceglia, I take it as a given that you are disputing everything that the government says. You should let your lawyers speak on your behalf. That is a wise thing to do. You should speak with your lawyers about any arguments that you wish them to make after we get off the phone. OK?

THE DEFENDANT: Your Honor, no, I can't allow this

transcript to go on without --

THE COURT: Wait, wait.

THE DEFENDANT: The government's position, quite frankly --

THE COURT: Mr. Ceglia --

MR. FOGG: Your Honor, may I address him on the phone?

THE COURT: Yes.

THE DEFENDANT: They are free in every civil litigation in the United States to simply choose the wealthy people who they have connections with, who are sitting in the back of that courtroom, and that that is a perfectly justified application of the mail and wire fraud section, to interfere with a civil litigation prior to any Court's ruling and to say that they are free to simply take the evidence of one side and indict the other party. I find that to be absolutely anathema to the Constitution. Thank you, your Honor.

THE COURT: Mr. Ceglia, you should speak with your attorney. If this is going to happen, in other words, you want to say something, I would prefer that you be physically present here. It is very difficult for your attorney to speak with you. And you should not say anything. You attorney is here representing you. All right? They will talk with you about this.

I understand you might have a desire to say something. But if you were here, you would be able to write them a note

and they could say whatever you ask them to say or not based upon their review and whether they felt it was appropriate. Having you on the phone, in my view, is creating a problem for me and for this trial and actually for your lawyers in representing you.

So I ask you to consider what I'm saying going forward. If you feel that you aren't going to be able to not say things, then I think perhaps you should talk to with your lawyers about whether you should just be physically here so that you are able to communicate with them.

Mr. Fogg, let me posit another thing. I don't know whether, as pro hac, you are entitled to get a card that would allow you to bring your phone or an electronic device into the court. I recognize there may be travel things and maybe additional costs associated with that. But I really don't want to have this situation happen at future conferences. I don't want to create issues where there should be none.

I ask you to think about it, talk to Mr. Messina, speak with your client, and figure out a way. I may actually end up directing that Mr. Ceglia have to be here physically for the conferences going forward. OK?

MR. FOGG: Yes, your Honor.

THE COURT: I want to clarify one thing -- I am trying to finish a civil case, and the lawyers and witnesses have been waiting patiently for me -- that was raised, and there is a

record of that, and Judge Carter spoke about that, with regard to his decision to transfer the case.

MS. ECHENBERG: Your Honor may have already reviewed the transcript, but I believe what Judge Carter said on the record was that he did not believe there was any conflict. That was also the government's view. But he said in an abundance of caution he was going to put another clerk who was working on the matter at issue on the case. It was then I believe approximately a month later when the case was transferred. So we have no information that that was the reason for the transfer.

THE COURT: It is a timing issue. As I understand it, the trial was scheduled to go forward in March or something. Judge Carter said, you are right, that he didn't believe there was a conflict, but in light of the objection by the defense, he was going to make a switch. My understanding is the clerk when had worked on the case was leaving, so the other clerks were available. There may have been some issues with regard to them.

MR. FOGG: Your Honor, if I may. It was on the last court date that the judge replaced the clerk and announced who the clerk was on the case, and we were satisfied with that.

THE COURT: Yes. The problem is that clerk wasn't going to be here through the trial. So, the Judge, in managing his docket, felt it wasn't efficient for him -- I don't want to

put words in his mouth. All I will say is the clerk he was going to put on it wasn't going to be able to be there for the trial.

What I will say from my perspective as a judge, if I have a clerk who has been working on a case, I would want them to be there for the trial, not only, quite frankly, for my benefit, because they have institutional knowledge, but also quite frankly for their benefit. So, I don't believe there was any actual conflict. The record will stand as it is.

Now, is there anything else that we need to deal with today?

MR. WILSON: Your Honor, just one scheduling issue. We set the date for motions in limine to be filed but we didn't talk about opposition or replies. It probably makes sense to do that quickly, if your Honor doesn't mind.

THE COURT: The date we set for --

MR. WILSON: April 1, 2015.

THE COURT: Two weeks for a response, reply one week. So it is April 1st, then the 15th for opposition, and then the 22nd for replies. OK?

MR. WILSON: Yes, your Honor.

THE COURT: I don't want to discuss this right now, but the parties need to consider, in light of the issue related to Mr. Ceglia's prior counsel and representation, I don't know who the witnesses are going to be. As I read the issue of

crime-fraud exception, it applies to documents which are being dealt with. I'm not going to discuss the substance of it at all. This is for the government, and for the defense in a way.

Does either party anticipate, and I don't want an answer now, calling any of the attorneys who had worked on these cases and asking them about things that aren't contained in documents, statements and the like, that could be considered privileged?

If that is the case, and I'm not sure whether either party has given this consideration, I think the same sort of process needs to be set up with regard to statements. In other words, in my view, as a legal matter there is no necessary distinction between how we should handle that and how we handle the crime fraud statements with regard to documents. Think about that.

I don't know whether there was any plan to call any of the lawyers other than to authenticate things. To the extent the parties hadn't thought about this issue, what I am saying is you need to treat those issues in the same way. I'm sure that the lawyers, the civil lawyers, themselves are cognizant of their obligations as prior attorneys for Mr. Ceglia. I just wanted to alert the parties that it occurred to me as I was thinking about this issue that there may be statements that are out there also. I would like you to think about that issue.

There are a couple of things that will be coming in,

and I am going to schedule a conference before I get the in limine motions. We might be able to do it on the phone. I think I may need to deal with some issues anyway that may crop up, including the subpoena issue and the potential one document that the government is going to consider whether to remove the confidentiality restrictions on.

Time. Has time been excluded?

MS. ECHENBERG: I believe multiple times it has been excluded until trial. It was Judge Carter's practice to put it on the record.

THE COURT: In light of the fact that I think, Mr. Fogg, and you can correct me if I'm wrong, you are still getting your sea legs, so to speak, and getting a sense of all the documents and the like, and there are still outstanding issues relating to motions, and to allow you to review the discovery, although I don't believe it is necessary because I believe that time has been excluded until May 4th, I would exclude the time in the interests of justice. I find that the exclusion is necessary and outweighs the interests of the defendant and the public in a speedy trial.

Is there anything else we need to deal with?

MS. ECHENBERG: Nothing from the government.

MR. FOGG: Nothing further, Judge.

THE COURT: Thank you.

(Adjourned)